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Issue date: 04Jan2001

CASE NO: 2000-LHC-00067
OWCP NO: 02-126304

In the Matter of

PAT ELIA

Claimant

v.

HOWLAND HOOK CONTAINER TERMINAL

Employer

Appearances:

Philip Rooney, Esquire
For the Claimant

John Karpousis, Esquire
For the Employer

Before: RALPH A. ROMANO
Administrative Law Judge

DECISION AND ORDER

This is a claim for workers' compensation benefits under the Longshore and Harbor Workers' Compensation Act, as amended (33 U.S.C. Section 901 et seq.), herein referred to as the "Act". The hearing in this matter was held on August 22-23, 2000 in New York, New York at which time all parties were given the opportunity to present evidence and oral arguments. The following references

will be used: Tr for Transcript, CX for Claimant's exhibits and EX for Employer's exhibits. This decision is rendered after having given full consideration to the entire record.

Post-trial briefs on behalf of the parties were filed by December 18,2000. [1]

ISSUE

The issue is whether Claimant has preponderantly established that he sustained an injury at work.

SUMMARY OF EVIDENCE

Claimant testified as to the details of an alleged accident at work on July 15,1999, his symptoms and medical treatment therefor (Tr.27-90). Co-worker's Perseghin , Ying, and Beckman (Tr. 93-114,EX M, and 120-151), and Claimant's foreman, Joseph Civitanova (Tr.164-208), were called by Employer.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

In arriving at a decision in this matter, the fact-finder is entitled to determine the credibility of the witnesses, to weigh the evidence and draw his own inferences from it, and he is not bound to accept the opinion or theory of any particular medical examiner. Sargent v. Matson Terminal, Inc., 8 BRBS 564 (1978); Brandt v. Avondale Shipyards, Inc., 8 BRBS 698 (1978); Banks v. Chicago Grain Trimmers Association, Inc., 390 U. S. 454 (1968), reh. Denied, 391 U. S. 929 (1968); Todd Shipyards v. Donovan, 300 F.2d 741 (4th Cir. 1962).

In Director, OWCP v. Greenwich Collieries, 114 S.Ct. 2251, 28 BRBS 43 (1994), the Supreme Court was called upon to decide whether the "true doubt" rule was consistent with the Administrative Procedure Act (APA), and which party shall bear the burden of persuasion in a case under the Act. In holding that the true doubt rule violates 4,67(c) of the APA, the Supreme Court interpreted "burden of proof" in 4,67(c) of the APA to mean "burden of persuasion." Id. Thus, where the evidence is evenly balanced, the benefits Claimant must lose, and in cases under the Act, the benefits Claimant has to prove his case by a preponderance of the evidence once the Section 920 presumption has been rebutted.

The term "injury" means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as natural §902(2); U. S. Industries/Federal Sheet Metal, Inc. el al v. Director, Office of Workers' Compensation Programs, U.S. Department of Labor, supra. The Act does not require that the injury

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[1] After trial CX 5 and EX M, N and O were submitted and same are hereby received into evidence.

be traceable to a definite time. The fact that a Claimant's injury occurred gradually over a period of time as a result of continuing exposure to conditions of employment is no bar to a finding of an injury within the meaning of the Act. Bath Iron Work Corp. v. White, 584 F.2d 569 (1st Cir. 1978).

The Section 20 presumption does not aid a claimant in establishing the occurrence of an accident or the existence of working conditions which could have caused the accident. Mock v. Newport News Shipbuilding & Dry Dock Co., 14 BRBS 275 (1981); Jones v. J.F. Shea Co., 14 BRBS 207 (1981); Graham v. Newport News Shipbuilding & Dry Dock Co., 13 BRBS 336 (1981); Bartelle v. McLean Trucking Co., 14 BRBS 166 (1981), aff'd 687 F.2d 34, 15 BRBS 1 (CRT) (4th Cir. 1982).

DISCUSSION

On the evidence presented in this case, I am compelled to conclude that Claimant has failed to establish, by a preponderance, that he sustained an accident at his job as alleged by him.

First, no one observed this alleged work accident, nor witnessed any complaints by, or behavior on the part of, Claimant consistent with the occurrence of such an alleged work accident (see Tr. 97, 123). Indeed, while Claimant insists that his co-worker, Mr.Ying, was at the scene of the accident, and joked with him about the accident at coffee just after its occurrence (Tr. 43-46), Mr. Ying denies observing Claimant fall, denies having discussed any such accident with him, and, in fact, didn't even have a coffee break with Claimant that day! (EX.M, at 6-8,14).[2]

Also, both Persegin and Beckman credibly testified of Claimant's stated intention, on the day of the alleged accident, to shortly leave Employer's employ to return to Florida [3] after collecting on the worker's compensation claim for the alleged accident (Tr.at 96, 99, 125). Tellingly, Claimant never refutes this evidence!

Moreover, Claimant, who shortly before this alleged work accident reported to management a minor finger cut caused at work (Tr.185), (perforce) inexplicably failed to report to management the subject alleged work accident. (Tr. 170).

Finally, Claimant's testimony that after the alleged accident he did only "paperwork" (Tr.41,46), is belied by the credible testimony of his foreman, who observed him resume chassis work later in the day, and who would, in any event, not have tolerated such activity even if it were appropriate to Claimant's job function, which it was not (Tr. 200-202).

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[2]Also, co-worker Beckman,who Mr. Ying notes was working close to Claimant(Ex M at 19-20),denied having observed any work accident (tr. 123).

[3]See Tr.,at 79 and181 for possible motive for returning to Florida.

In sum, the evidence presented by Claimant to establish the fact of the occurrence of a work accident, critical to his establishing his claim for compensation, is found not creditable, and, in no sense, preponderant.

ORDER

Accordingly, the claim of Pat Elia, is **DENIED**.

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RALPH A. ROMANO
Administrative Law Judge